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No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION,

Petitioner,

v.

THE UNITED STATES and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

PAUL D. CULLEN
Counsel of Record
ROBERT L. MEUSER
MICHAEL R. KERSHOW
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 342-8400

Attorneys for Amici Curiae

Of Counsel:

WILLIAM F. FOX
WILLIAM D. APPLER
COLLIER, SHANNON, RILL & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

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BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

The Committee to Preserve American Color Television and the Imports Committee, Tube Division, Electronic Industries Association, hereby respectfully request as *amici curiae*[1] that the United States Supreme Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Customs and Patent Appeals ("CCPA") in *Montgomery Ward & Co., Inc. v. Zenith Radio Corp.*, 673 F.2d 1254 (CCPA 1982).

INTEREST OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION

The Committee to Preserve American Color Television (a.k.a. COMPACT) is an unincorporated association comprised of 11 labor organizations and four corporations engaged in the manufacture of finished television receivers and their various parts and

1. All of the parties have consented to the filing of this *amicus* brief. Letters containing counsels' written consent are on file with the Clerk of this Court.

components.[2] Since its organization in 1976, COMPACT has represented the interests of the domestic television industry and its workers in various administrative and judicial proceedings under the U.S. international trade laws. COMPACT has actively participated in various phases of the administration and enforcement of T.D. 71-76, the Secretary of the Treasury's formal dumping finding respecting television receivers from Japan, the subject of this case. The Imports Committee, Tube Division, Electronic Industries Association ("Imports Committee") is an association of manufacturers of color television picture tubes and glass for such picture tubes. The Imports Committee filed the original dumping petition which led to promulgation of T.D. 71-76 in 1971.

COMPACT and the Imports Committee have filed suit in the U.S. Court of International Trade[3] challenging the lawfulness of the same settlement agreements which are the subject of the present litigation. The decision of the CCPA for which certiorari is sought could, if allowed to stand, prevent COMPACT and the Imports Committee from litigating many of the important issues surrounding the government's conduct in the television dumping matter.

STATEMENT OF THE CASE

This case tests the accountability of government officials for failing to assess and collect antidumping duties on imported merchandise subject to a formal dumping finding.

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2. The participants in COMPACT include the Industrial Union Department, AFL-CIO; the Allied Industrial Workers of America, International Union; the American Flint Glass Workers Union of North America; the Communications Workers of America; the Glass Bottle Blowers' Association of the U.S. and Canada; the Independent Radionic Workers of America; the International Association of Machinists; the International Union of Electrical, Radio and Machine Workers; the International Brotherhood of Electrical Workers; the United Furniture Workers of America; the United Steelworkers of America; Corning Glass Works; Owens-Illinois, Inc.; Sprague Electric Company; and Wells-Gardner Electronics Corp.

3. *Committee to Preserve American Color Television (a.k.a. COMPACT)* v. *United States*, Court No. 81-3-00258 (Ct. Int'l Trade filed March 9, 1981).

The 96th Congress was responsible for undertaking three major reforms in the field of international trade law, each of which was directly related to Executive Department accountability for proper enforcement of the law. First, Congress passed the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), which included a major overhaul of the administrative procedures applicable to antidumping proceedings and a major expansion of the rights of domestic interests to judicial review following administrative action. The reforms embodied in the 1979 law which relate to the assessment and collection of antidumping duties[4] —including the right to a hearing and the absolute right to judicial review—were designed to provide a "greater role for domestic interested parties" and greater "procedural safeguards." S.Rep. No. 249, 96th Cong., 1st Sess. 81 (1979). *See also* H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979). Second, Congress ratified Reorganization Plan No. 3 of 1979, which transferred the administration of antidumping proceedings from the Secretary of the Treasury to the Secretary of Commerce. 44 Fed. Reg. 69273 (1979); Exec. Order No. 12188, 45 Fed. Reg. 989 (1980). Both the Senate and the House were critical of the Treasury Department's administration of the

4. The Trade Agreements Act of 1979, section 101 of which added a new Title VII to the Tariff Act of 1930 ("the Act"), 93 Stat. 144, 150 (1979), created or continued the existence of a number of legally protected rights for members of the injured domestic industry and its workers. First, section 731 of the Act continued the clear cut and unequivocal mandate of the prior law that once a finding of dumping is made, "there *shall* be imposed upon such merchandise an antidumping duty...." 19 U.S.C. § 1673 (Supp. III 1979) (emphasis added). *Cf. id.* 161(a) (1976) (repealed). Second, strict time limitations were imposed on the administering authority, mandating that at least once every 12 months "the administering authority . . . *shall* . . . review and determine . . . the amount of any antidumping duty." *Id.* § 1675(a)(1) (Supp. III 1979) (emphasis added). Third, interested parties were given the right to a hearing during this annual administrative determination of antidumping duties, *id.* § 1675(d), together with access to confidential information subject to a protective order, *id.* § 1677f(c)(1), in order to ensure meaningful participation in the administrative process. Finally, section 1001 of the Trade Agreements Act of 1979, 93 Stat. at 300, gave interested parties expanded rights of judicial review to challenge determinations with respect to the assessment of antidumping duties, 19 U.S.C. § 1516a (Supp. III 1979), together with the right, under appropriate circumstances, to obtain injunctive relief preventing the liquidation of entries prior to the conclusion of judicial review of the assessment determination. *Id.* § 1516a(c)(2).

antidumping law. S.Rep. No. 402, 96th Cong., 1st Sess. 12 (1979); H.R.Rep. No. 585, 96th Cong., 1st Sess. 6 (1979). The repeated failure of the Treasury Department to implement the statutory remedy for dumping—the assessment and collection of a special antidumping duty—was clearly a paramount concern of the Congress. Third, Congress passed the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980), the principal purpose of which was to create a new court, the United States Court of International Trade, with vastly expanded powers to provide comprehensive relief to aggrieved parties in disputes involving international trade matters. Congress vested the new court with exclusive jurisdiction over international trade matters, 28 U.S.C. § 1581 (Supp. IV 1981), full equity powers, and all of the prerogatives of district courts of the United States, *id.* § 1585.

On April 28, 1980, the Secretary of Commerce, following secret negotiations with the Government of Japan, Japanese television manufacturers and various importing interests, ignored the procedures of the 1979 legislation related to the assessment of antidumping duties and concluded bilateral settlement agreements with 22 importers covering the great bulk of imported television receivers subject to T.D. 71-76. The views of the domestic television industry were not solicited prior to the execution of these agreements despite its obvious and well-documented interest in the enforcement of T.D. 71-76. The Secretary of Commerce relied upon section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976) (hereinafter "section 617"), as the authority for entering into these bilateral settlement agreements. Section 617, which had its conceptual origin during the Civil War, was first enacted in its modern form as part of the Tariff Act of 1922. 42 Stat. 858 (1922). Treasury Department records produced in the *Zenith* litigation confirm that not once in the sixty year history of this provision did the Secretary of the Treasury use it for the compromise of antidumping duties. Nevertheless, under the terms of the April 28 settlement agreements,

the government agreed, *inter alia*, not to assess what COMPACT, the Imports Committee, and Zenith believe are hundreds of millions of dollars in dumping duties called for under the law.

In the present litigation, Zenith challenges the lawfulness of the April 28, 1980 settlement agreements on a variety of legal, substantive, and procedural grounds. Count I of the Zenith complaint alleges that section 617 does not authorize the Secretary of Commerce to bypass the procedures for an annual determination of antidumping duties under section 751(a) of the Act, 19 U.S.C. § 1675(a) (Supp. III 1979). Count II of the Zenith complaint alleges that even if there is some authority to compromise antidumping duties under section 617, the April 28, 1980 settlement agreements were entered into in bad faith and were solely the product of political considerations; and that officials of the United States Government abdicated their responsibility under the antidumping law, not only by circumventing the explicit procedural directives imposed by the Trade Agreements Act of 1979, but by consciously disregarding the interests of the intended beneficiaries of T.D. 71-76—the domestic television industry and its workers. See particularly paragraphs 34-37 of Zenith's First Amended Complaint, reproduced in Zenith's Petition for Certiorari, App. F at 58a-61a.

The *Zenith* case came before the CCPA on an appeal by a nonparty from an order of the trial court denying the government's motion for a protective order precluding discovery. The CCPA bypassed the narrow discovery issue before it and decided *sua sponte*—without the benefit of oral argument, without briefing on point, without a printed record, and without the benefit of revealing discovery documents which had been called to the attention of the trial court—profound issues going to the very heart of the subject matter jurisdiction of the new Court of International Trade.

In its haste to dispose of the Zenith litigation, the CCPA appeared to confuse subject matter jurisdiction with the merits. The Court brushed aside Zenith's allegations of bad faith as "perfunctory" and ordered the action dismissed for lack of subject

matter jurisdiction. *Montgomery Ward & Co., Inc. v. Zenith Radio Corp., supra*, 673 F.2d at 1264-65. Whether Zenith's allegations of bad faith presented a cognizable claim is a question which, if bad faith is reviewable at all, goes to the merits of its cause of action. The CCPA could not, of course, rule on the merits of Zenith's causes of action under the guise of subject matter jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). By directing dismissal of Zenith's action for lack of subject matter jurisdiction, one possible reading of the CCPA's decision is that matters committed by law to agency discretion are never reviewable even where bad faith or abuse of discretion are alleged. It is, of course, possible that the CCPA mistakenly cast its decision in terms of subject matter jurisdiction because that was the only way it could dispose completely of the Zenith litigation on a *sua sponte* basis even though the only question before it was a narrow collateral discovery issue raised by a stranger to the litigation.

The CCPA's opinion illustrates the trouble an appeals court can get itself into when it accepts jurisdiction over an interlocutory discovery order and then strays into questions related to the merits or subject matter jurisdiction without a proper record before it and without briefing of such important issues by the parties. Quite apart from the important substantive issues raised by the Zenith petition, the action of the CCPA in deciding issues of such great importance *sua sponte*, without the benefit of briefs, oral argument, or a printed record and without reference to the materials produced by the government during discovery "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision." Sup. Ct.R. 17.

REASONS FOR GRANTING THE WRIT

1. The question of whether the procedural safeguards and the rights of judicial review established in the Trade Agreements Act of 1979 can be ignored by reliance on the general compromise authority contained in section 617 presents a substantial question respecting the enforcement of our international trade laws with important implications for the general body of administrative law.

The issue presented in this matter is one of major importance under the antidumping law as well as under general principles of administrative law. Simply put, the question is whether a grant of general compromise authority enacted in its modern form in 1922[5] and never previously used in an antidumping proceeding can be deemed to constitute a nonreviewable commitment of settlement authority to agency discretion within the meaning of section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976). The CCPA would permit the Secretary of Commerce to exercise the claimed settlement authority uninhibited in any way by the provisions of the 1979 legislation which granted domestic interests elaborate procedural rights to participate in the orderly administrative determination of antidumping duties—the subject matter of the proposed settlement—as well as specific rights to judicial review of that administrative determination.[6] The ability of the Secretary of Commerce to bypass the specific procedures mandated by Congress for the assessment and collection of antidumping duties, as well as the ability to preclude judicial review of his actions under the claim that settlement authority is wholly committed to agency discretion, raises an issue of enormous significance under the antidumping law. The

5. *See* Zenith's Petition for Certiorari at 12 n.15.

6. The CCPA specifically held that "[t]he only law to apply here is set forth as procedural requirements in 19 U.S.C. § 1617, and any legal wrong to Zenith must be based on the Secretary's violation of the procedures set forth therein." 673 F.2d at 1262. The salient provisions of the antidumping law ignored by the court are set forth in footnote 4, *supra*.

resolution of that issue by this Court will involve the Court in an issue of great importance to the general body of administrative law as well.

The CCPA's decision ignores the presumption of reviewability articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), where this Court stated that this presumption may be overcome only by "clear and convincing evidence." *Id.* at 141. In the landmark case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), this Court stated that the "committed to agency discretion" exception is "very narrow," applicable only in those "rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Id.* at 410 (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). In the present case, this Court will have the opportunity to clarify this frequently criticized "no law to apply" dictum.[7] In the event that the Court considers this standard to be of continued utility, it will be asked to decide whether the search for "law to apply" is to be confined to the admittedly general provisions of section 617 or whether a reviewing court should conduct a fair appraisal of the entire legislative scheme relating to dumping matters, including the legislative policies underlying the procedural safeguards enacted by Congress in the Trade Agreements Act of 1979.

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7. Professor Davis, in the latest supplement to his treatise on administrative law, characterizes the "no law to apply" standard as an "infection" attacking the body of law of judicial review of administrative action, and prescribes as a cure the "antibiotic" contained in section 706(2)(A) of the APA that "The reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion." K. Davis, Administrative Law Treatise § 28.16, at 499 (Supp. 1982). In Davis' view, "*Discretion which is unguided by law is often more in need of review than discretion in applying law.*" *Id.* (emphasis in original).

Such respected commentators as Louis Jaffe and Raoul Berger are in substantial accord with Professor Davis' view that *abuses* of discretion are reviewable notwithstanding the provisions of section 701(a)(2) of the APA. *See, e.g.*, L. Jaffe, Judicial Control of Administrative Action 359, 375 (1965); Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum L. Rev. 55 (1965).

2. There is a conflict between the U.S. Court of Customs and Patent Appeals and the U.S. Court of Appeals for the District of Columbia Circuit with respect to the reviewability under the Administrative Procedure Act of an exercise of settlement authority by federal officials.

The decision of the CCPA in the present litigation is diametrically opposed to the decision of the D.C. Circuit in its recent decision in *Local 1219, American Federation of Government Employees v. Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982). In *Zenith*, the CCPA stated:

> No situation is more within the category of "no law to apply" than the multifaceted judgmental decision to settle a claim. Thus, the substance of the settlement is clearly outside the scope of judicial review.

673 F.2d at 1262.

In *Local 1219, supra*, the D.C. Circuit was called upon to address the authority of the judiciary to review a settlement agreement between the Department of Labor and a federal employees' union which resolved charges of unfair election procedures pursuant to section 7120 of the Civil Service Reform Act of 1978, 5 U.S.C. § 7120, and regulations promulgated thereunder, 29 C.F.R. § 208.66. Plaintiff appellees, four locals of the employees' union and 86 individual members, filed suit claiming that the settlement agreement failed to provide an appropriate remedy for the violation. The plaintiffs in *Local 1219* were the intended beneficiaries of the Civil Service Reform Act of 1978, just as an injured domestic industry and its workers are the intended beneficiaries of the antidumping law.

Unlike the CCPA in *Zenith*, the D.C. Circuit in *Local 1219* had little difficulty in harmonizing the *Overton Park* "no law to apply" dictum with the "strong presumption of judicial review" relied upon in *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979). *Local 1219, supra*, slip op. at 7. Looking at the entire legislative and regulatory scheme as well as clear expressions of congressional purpose, the court found more than sufficient "law to apply." *Id.* at 8-9. The CCPA, on

the other hand, ignored the overall statutory scheme of the antidumping law and conducted its search for "law to apply" solely within the narrow framework of section 617. *See* footnote 6, *supra*. The CCPA failed to find a single substantive constraint upon the Secretary of Commerce's putative authority to settle claims for antidumping duties. Moreover, the D.C. Circuit specifically rejected the government's contentions—so readily accepted by the CCPA—that judicial review was inappropriate because "settlement negotiations involve special matters of agency expertise" and that courts are ill-suited to assess the impact of a settlement. *Id.* at 9. In contrast, the D.C. Circuit held that courts are "well acquainted with the task of approving settlements of enormous complexity [and] . . . . especially suited to the task of assuring that the interests of those not party to the negotiations have been adequately protected." *Id.* at *10*.

The CCPA, soon to be melded into the U.S. Court of Appeals for the Federal Circuit, and the D.C. Circuit are two of the most important federal appeals courts which deal with challenges to federal agency action under section 10 of the Administrative Procedure Act. The chasm between these two courts on the question of reviewability of agency settlement authority could not be wider. Clarification of this Court's decision in *Overton Park* is badly needed and long overdue.

3. Assuming *arguendo* that the execution of bilateral settlement agreements in antidumping proceedings is a matter committed by law to agency discretion, the pending petition raises the fundamental question of whether review of discretionary action is appropriate when allegations of bad faith are made.

The decision below raises an important question of administrative law: under what circumstances, if any, are allegations of bad faith and abuse of discretion reviewable in situations where the underlying agency action is held to be committed by law to agency discretion? Before discussing the compelling reasons why this question ought to be addressed, some of the allegations of bad faith which were called to the attention of the courts below

should be examined. The following recitation is given for illustrative purposes only and is by no means a complete statement of the evidence of the government's bad faith amassed thus far in the *Zenith* litigation.

Zenith's complaint, together with supporting evidence submitted to both the Court of International Trade and the CCPA, raises substantial and non-frivolous issues with respect to "bad faith." Prior to Spring 1978, the Treasury Department had permitted over six years of television imports to enter the country without assessing antidumping duties. In May of 1977 the United States and Japan entered into an Orderly Marketing Agreement (OMA) restricting Japan's color television exports to this country. At the time this OMA was negotiated, a secret side agreement was also executed in which the United States Special Trade Representative agreed that antidumping duties would thereafter be assessed "in strict conformity with the international [sic] Antidumping Code."[8] Since the assessment of duties under the Code would be less than duties assessed under the Antidumping Act of 1921, this agreement probably violated Pub. L. No. 90-634, tit. 2, § 201, 82 Stat. 1347 (1968) requiring any conflict to be resolved in favor of the 1921 Act. The Government of Japan took the position that this secret side agreement barred further assessment of duties.[9] While the United States has denied that the Government of Japan's interpretation was correct, the insistence of the Government of Japan that the United States was reneging on an agreement undoubtedly contributed to the subsequent willingness of our government to curtail the enforcement of the television dumping finding in response to political pressures from Japan.

During March of 1978 the Customs Service was preparing to assess approximately $382 million in antidumping duties on television receivers imported prior to April 1977. At the last

8. See paragraph 37 of Zenith's First Amended Complaint, which is reproduced in Zenith's Petition for Certiorari, App. F at 60a. The secret side agreement was finally made public at hearings before the House Trade Subcommittee in 1978. *See Multilateral Trade Negotiations: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means* (Serial 95-90), 95th Cong., 2d Sess. 15-17 (1978).

9. *Administration of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means* (Serial 95-114), 95th Cong., 2d Sess. 262 (1978).

moment, however, following a meeting between Treasury Department officials and officials from the Japanese Embassy, those planned assessments were cut to $46 million, covering sets imported only through mid-1973. Zenith Petition for Certiorari, App. F at 49a-50a. A State Department memorandum dated June 21, 1978, later produced in the *Zenith* litigation and called to the attention of the CCPA, described the reasons behind the last minute decision to circumscribe the planned assessments. The memorandum describes a State Department meeting with an official at MITI's Americas Bureau:

> On June 8 I had dinner with an official from MITI's Americas Bureau.
>
> I congratulated him on his part in devising the GOJ negotiating tactics and scenario on the color TV dumping issue in late March and described to him our preceptions of the tactics (see my June 1 memo to you).
>
> He accepted the compliment and confirmed that the tactics were as I described them. He added that MITI, the Ministry of Foreign Affairs, and the Japanese TV industry had met for two days solid in March,—with the sessions extending late at night, to develop tactics. They were not very confident that they would succeed, he said, but they were very happy with the outcome. *He ascribed the GOJ success to approaches to the most senior USG trade policy officials, who could then make a "political decision."* (emphasis added).[10]

Evidence of political rather than legal decisions is apparent throughout. Actual settlement negotiations with representatives of the Government of Japan began in October 1978. In late November 1978, a special assistant to the General Counsel of the Treasury Department travelled to Japan to conduct settlement negotiations with the Japanese Government. Certain tentative commitments with respect to the administration of T.D. 71-76, which *amici* believe at least bordered on illegality, were made by the United States during those talks. Notes made by the Treasury Department official during the negotiations reflect

10. This entire memorandum may be found in Appendix 4 of the *amicus* brief filed by COMPACT and the Imports Committee in support of Zenith's petition for rehearing before the CCPA.

acquiesence by U.S. officials in schemes to permit reimbursement by foreign producers of dumping duties paid by U.S. importers; under applicable regulations, the government must deny importers the benefits of reimbursement, *see* 19 C.F.R. 353.55 (1981); *id.* § 153.49 (1979). These notes also evidence schemes to rig subsequent verification efforts by the Customs Service in order to facilitate the granting of claims for adjustments which would lower dumping duties,and agreements to revoke the dumping finding as soon as possible.

This initial settlement initiative was aborted in December 1978, when Treasury officials were informed by members of Congress that implementation of the Tokyo Round of the Multilateral Trade Negotiations would be in jeopardy if T.D. 71-76 were settled as proposed. After approval of the Multilateral Trade Agreements, settlement efforts were resumed, with the Office of the United States Special Trade Representative continuing its intense involvement. A November 8, 1979 State Department memorandum establishes that in the fall of 1979, Ambassador Alan Wolff, Deputy Special Trade Representative, informed certain representatives of Japanese television manufacturers that he hoped T.D. 71-76 would be settled before the end of 1979, when jurisdiction over T.D. 71-76 was to be transferred to the Commerce Department and it was feared that settlement prospects would be complicated because Commerce "will want to prove itself."[11]

Following transfer of responsibility over T.D. 71-76 to the Commerce Department in January of 1980, documentary evidence establishes that settlement strategy and negotiations were managed by R. Theodore Hume, then Assistant General Counsel in the Office of the United States Trade Representative ("USTR"), not by the Commerce Department. The record as a whole shows that the General Counsel of the Commerce Department was merely a pawn in the entire settlement process, which had been set in motion at an earlier time and which was being

11. The entire memorandum may be found in Appendix 6 of the *amicus* brief filed by COMPACT and the Imports Committee in support of Zenith's petition for rehearing before the CCPA.

managed out of the Office of the USTR. The Special Trade Representative's secret side agreement in 1977 had clearly raised the expectations of the Government of Japan with respect to the enforcement intentions of the United States in the television dumping proceeding. The USTR's special interest in smoothing things over with Japan and eliminating the problem created by Japan's expectations following the 1977 secret side agreement clearly had a much higher priority than enforcement of the antidumping law for the benefit of an injured domestic industry.

In an effort to cloak the April 28, 1980 settlement agreements with a gloss of administrative regularity, the government included in the record the Declaration of the former General Counsel of the Commerce Department. That Declaration, which included a copy of the General Counsel's April 28,1980 settlement recommendation to the Secretary, contains a number of false and misleading statements, significant portions of which are material under the provisions of section 617:

— Paragraph 8 of the Declaration states that officials of the Department of Commerce completed the estimate that the maximum amount of antidumping duties that could be claimed was $138.7 million. In fact, the estimate was not made by responsible officials at Commerce, as required by section 617, but rather by the Assistant General Counsel, USTR, using a computer maintained by the USTR.

— Paragraph 9 of the Declaration states that following the General Counsel's return from Japan in April 1980, additional analyses of litigation risks and probabilities of recovery were made. Paragraph 12 states that litigation risks were analyzed "for each importer." In fact, the Deputy General Counsel for Import Administration, the General Counsel's principal legal advisor in antidumping matters (including T.D. 71-76), disclosed that neither he nor anyone on his staff conducted such an analysis.

— On pages four, five and seven of the General Counsel's April 28, 1980 memorandum to the Secretary, it states that *the maximum* amount of dumping duties which could be claimed using theories *most favorable* to the

government was $138.7 million. In fact, the $138.7 million projection is based upon legal theories and factual findings most hospitable to importers, not the government. The $138.7 million was close to the *minimum*, not the maximum, amount which could be collected.

— On page four of the April 28, 1980 memorandum, the General Counsel advised the Secretary that even the $138.7 million could be lowered in court challenges by importers. The General Counsel failed to advise the Secretary that the $138.7 was subject to increase if a court challenge by domestic interests were successful.

— On pages five through six of the April 28, 1980 memorandum, the General Counsel urged that settlement was desirable because the use of the Japanese Commodity Tax methodology in ascertaining foreign market value was vulnerable to attack in litigation. Neither the General Counsel nor any of the memoranda which discuss the vulnerability of the Japanese Commodity Tax methodology pointed out that use of that methodology accounted for only a small portion of the actual duty liability of importers. The great bulk of importers' liability turned on routine legal questions regarding circumstances of sale adjustments and the like. In reality, the government could abandon the perceived risk of the Commodity Tax methodology without significantly lowering the dumping duty exposure of importers. References to litigation risks surrounding the Japanese Commodity Tax methodology were highly misleading.

The report provided to the Secretary of Commerce was not a reasoned factual analysis of the basis for settlement. In reality, those documents were facile and biased attempts to "paper over" the settlement, and were knowingly premised upon questionable legal positions and an illusory factual foundation. They were written solely to provide the means to achieve a desired end. Critical factual predicates in the General Counsel's rationale were untrue.

This is not a case where a plaintiff must probe the "mental processes" of the Secretary in order to overturn the substance of his decision. Indeed, the materials presented to the Secretary of

Commerce upon which his "mental processes" were presumably to function were so tainted and so demonstrably inadequate to prepare him for the decision at hand that whatever "mental processes" he engaged in in approving the settlement had to be entirely irrelevant.

The foregoing evidence of bad faith was adduced before the CCPA—and is again recited for this Court—merely to establish that Zenith's claims are not frivolous. Whether the settlement agreements were indeed the product of bad faith is an issue of fact which the Court of International Trade should be permitted to try on the basis of all the evidence available to the parties. If the CCPA's opinion means that claims of bad faith in the exercise of administrative discretion are simply not cognizable by the courts of law—that Zenith has no right to attempt to prove its allegations—then the CCPA's opinion raises questions with profound significance for the future administration of the antidumping law.

This Court has never directly ruled on the issue of whether or under what circumstances discretionary action may be reviewed where there are allegations that the agency's actions were motivated by bad faith or clearly defiant of the law. The door to such review was, however, left open in *Dunlop v. Bachowski*, 421 U.S. 560 (1975). The present controversy presents one of those "rare case[s]" where the administering authority is charged with completely abrogating its enforcement responsibilities—a circumstance under which even the Government, in *Dunlop, supra*, conceded the existence of reviewing authority. *Id.* at 573.

CONCLUSION

This Court has long advocated a presumption of judicial review. *Abbott Laboratories v. Gardner, supra* at 140. There is not a scintilla of evidence to support the proposition that Congress intended to commit the compromise of antidumping duties to agency discretion. Indeed, all indications are to the contrary. A more serious question is whether section 617 may be applied in antidumping proceedings at all when the result of such application is to abrogate the newly-enacted procedural safeguards of the

antidumping law. Assuming *arguendo* that the archaic provisions of section 617 can be harmonized with the specific procedural safeguards of the 1979 law, it is clear that the CCPA's ruling is faithful neither to the presumption of reviewability established by this Court nor to the obvious purpose of recent congressional reforms in the area of international trade. Congressional efforts to endow the new Court of International Trade with subject matter jurisdiction broad enough to permit it to deal with the full range of issues arising in international trade disputes have been frustrated while the new court is still in its infancy. Since the CCPA is the only appellate court with jurisdiction over matters affecting international trade, it is essential that its unprecedented decision be reviewed by this Court at the earliest possible date.

For the foregoing reasons, Zenith's petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL D. CULLEN
Counsel of Record
ROBERT L. MEUSER
MICHAEL R. KERSHOW
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 342-8400
Attorneys for Amici Curiae

Of Counsel:
WILLIAM F. FOX
WILLIAM D. APPLER
COLLIER, SHANNON, RILL & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

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